

# Where Power Lies or Where Power Lied?

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Tomorrow, on Tuesday 17 September, the UK Supreme Court will be asked to consider appeals from the Court of Session in Scotland, and the High Court in England on the question of whether prime minister Boris Johnson's advice to the Queen to prorogue parliament was lawful. Such a question will oblige the court to consider foundational questions of the separation of powers and the division between law and politics. It will also have to decide whether the motives of executive decision-making can be judged against principles of parliamentary sovereignty, democracy and the rule of law. If the Supreme Court finds the advice was unlawful, an even more difficult question arises in what sort of order may be given to remedy such a legal wrong: can the court order Parliament to return to a session which has ended, or the Queen to 'un-prorogue'?

On Tuesday last week, the UK parliament was prorogued [amid roars of objection and censure](#) from opposition benches: prorogation was not a [paper tiger](#). Prorogation ends the current session of Parliament as well as any bills which have [not become law](#). While prorogued, Parliament does not meet, debate, legislate or [scrutinise](#) government policy and action. The practical effect of prorogation was to eliminate five weeks of parliamentary time from the eight weeks left before withdrawal on no deal Brexit terms. This consequently increased the likelihood of no deal Brexit to a near certainty, as Parliament must legislate for any outcome other than a no deal Brexit.

A new session is scheduled to begin on 14 October 2019. The final EU Council summit scheduled before the Article 50 deadline will take place on 17-18 October. This is the last opportunity for the UK to come to an agreement with the EU, or to request a further (and third) extension of the Article 50 deadline beyond 31 October. If the EU Council reject the UK's [legislated](#) request for an extension, or – more controversially – if Johnson [refuses](#) to follow the law and make such a request, there will only be days left for Parliament to avert a no deal outcome.

Legal action was immediately launched in all three legal systems which constitute the UK ([England and Wales](#), [Scotland](#), and [Northern Ireland](#)) seeking judicial review of Johnson's advice to prorogue for such a length of time under current circumstances, arguing it was '[unlawful, unwarranted and unconstitutional](#)'. Refuting such claims, government argued that the prorogation was a normal exercise of an ordinary power to *inter alia* allow sufficient time for a new legislative agenda. Furthermore, either as the exercise of a sovereign power, or as a matter of politics, the court is unsuited by nature and constitution to adjudicate, and that '[\[i\]f Parliament had a problem with it, it was for Parliament to sort it out](#)'. Judicial review focused on the Prime Minister's advice to the Queen, as the Queen's decision to prorogue cannot be subject to judicial review.

The English High Court found that the prime minister's advice was [not justiciable](#), and so it was lawful. Less than four days later, the Scottish Court of Session came to the opposite conclusion, finding that the issue was justiciable and the advice was '[unlawful and is thus null and of no effect](#)'. The Northern Irish High Court declined to give judgment on the question of prorogation.

## **Is Johnson's advice to the Queen to prorogue justiciable?**

The first issue is one of justiciability, or whether as a matter of '[high policy and political judgment](#)' it cannot, and should not, be determined by the courts. The English High Court found that the advice was '[inherently political in nature](#)' and as such is non-justiciable. Paul Craig is [dismissive](#) of such a conclusion, noting that prorogation does not necessarily involve 'high policy' and is in most instances unproblematic. Equally, the fact that there is a political purpose for the use of power, does not negate that it may be an improper purpose and so subject to judicial review. The Scottish Court of Session were similarly dismissive of a wide discretion and deference to the executive in finding that 'the courts have jurisdiction to decide whether any power, under the prerogative or otherwise, has been legally exercised'. [Not only](#) does this follow from precedent in both English and Scots law, but it is axiomatic in any legal system bound by the rule of law that any exercise of government power is limited, and that such limitation can be determined by a court of law.

## **Could Johnson's advice to the Queen be unlawful?**

The English High Court rejected consideration of the prime minister's advice to the Queen as it considered there to be 'no appropriate or judicial or legal standards' against which the legality of the executive decision could be assessed. The Court acknowledged, though did not examine, the variety of political reasons both allowed and given for prorogation. It also conjectured that it would be impossible for a court to find the length of time to be excessive or to assess 'by any measurable standard how much time is required "to hold the Government to account"'. However, this focus on the *length* of time is arguably misplaced (a '[strikingly unsophisticated approach](#)'), and misunderstands the question as asking the courts to consider the application of the power, rather than on an improper purpose for which it could have been used.

The Scottish Court of Session rejected the position that there could be no legal standard against which to measure the prime minister's advice. While acknowledging that power used for legitimate political purposes (including, we can infer, enabling Brexit) could not be challenged, the Court of Session found that the 'purpose was to stymie parliamentary scrutiny of the executive, which was a central pillar of the good governance principle enshrined in the constitution; this followed from the principles of democracy and the rule of law'. To prorogue parliament with such an improper [political purpose](#) is unlawful.

## If the advice is found to be unlawful, what could the legal consequence be?

The Supreme Court has now to determine whether the English High Court, or the Scottish Court of Session is correct on the lawfulness of the prime minister's advice to the Queen. (Although highly unlikely, though not impossible, the court could uphold *both* decisions as right under their respective legal systems). If the Supreme Court finds the advice is unlawful, further challenging issues will be raised as to what the legal remedy should be.

If, following the indication of the judgment of the Scottish Court, the Supreme Court orders that the advice was 'null and of no effect' – it implies that the last session of Parliament has not ended, implicitly ordering the Parliament to return, as a consequence also resurrecting bills which had not become law. Alternatively, it may [compel](#) government to exercise its own power to recall Parliament from prorogation, and to begin a new session. A further proposition may be in the creation of an obligation upon the Queen to take back her order to prorogue. In each one of these scenarios, however, the court is exercising a power over the other constitutional organs of state that it may not be permitted to do by either nature or constitution: in aiming to uphold the separation of powers – it may be undermining it.

The Supreme Court may avoid all such difficult reasoning, and instead uphold the High Court judgment in ruling that the issue is non-justiciable and so distance themselves from [attacks](#) on the judiciary as becoming politicised. But larger concerns emerge: as Sionaidh Douglas-Scott [aptly writes](#), the 'British Constitution rests on a balance of power between executive, legislature and judiciary, and if Parliament is suppressed, then judicial intervention is essential, not activist'. Ultimately, in finding whether Johnson's advice to the Queen to prorogue parliament was for a lawful purpose, the Supreme Court will determine where [power lies](#) or whether power has *lied*.

